

JURISDICTION ON THE INTERNET

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1. Background: General Principles of Personal Jurisdiction.

This is the Second Report of the Internet Industry Committee on jurisdictional issues posed by this new medium under the Due Process Clause. As one court remarked last year, "development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages." Although patterns are slowly beginning to emerge, the cases still show some inconsistency and confusion.

As discussed in the First Report, courts recognize two kinds of personal jurisdiction, general and specific. General jurisdiction subjects a non-forum defendant to the forum's jurisdiction regardless whether the claim at issue arose out of any contact by defendant with the forum. Because of its broad reach, courts have traditionally required that general jurisdiction be based upon "systematic and continuous contacts" between the non-domiciliary defendant and the forum state.

Specific personal jurisdiction is narrower and applies where a non-resident defendant's contacts with the forum state are related to or arise out of the particular dispute in issue. To satisfy constitutional due process, the non-resident defendant must have had sufficient minimum contacts with the forum such that subjecting it to jurisdiction does not offend "'traditional notions of fair play and justice'." This in turn requires some act by which the defendant has either purposefully directed its activities onto or consummated a transaction in the forum, or otherwise acted in a way to avail itself of the privilege of doing business in the forum state.

Availing oneself of the privilege of conducting business in the forum is established if a party reaches beyond its state of domicile to "create continuing relationships and obligations with citizens of another state." For example, a single contract between a forum state resident and an out-of-state party taken alone may not establish sufficient minimum contacts to support personal jurisdiction, but when added to contacts such as telephone calls and mail into the forum state, they can collectively form a basis for jurisdiction. If the nonresident has either purposefully directed activities to the forum state or availed himself of the privilege of conducting activities in the forum, the court must still determine whether invoking personal jurisdiction would be fair.

"Purposeful direction" can sometimes be indirect. Under the so-called "effects test," the court may base jurisdiction on an act outside the forum which has foreseeable effects within the forum. For example, in the pre-Internet context of traditional print media, the Supreme Court in Calder v. Jones found "purposeful direction" by reason of an article which defamed a California resident written by Florida residents for publication in the National Enquirer. Because the Enquirer had its largest circulation in California and was the focal point of both the story and the harm suffered by the plaintiff, the Court found that defendants' must reasonably have foreseen potentially devastating effects on the California resident. Another doctrine important to personal jurisdiction is the so-called "narrow stream of commerce" articulated in Asahi Metal Industry Co. v. Superior Court of California. Under this doctrine, placement of a product into the stream of commerce outside the forum, if accompanied by conduct indicating an intent to serve the market in the forum state, can support specific jurisdiction.

2. Internet and Previous Means of Communication. Difference between the

At least on the surface, traditional jurisdictional principles might appear more difficult to apply because of the Internet's decentralized structure. Information passes over the Internet via a network of networks, some linked to other computers or networks, some not. Not only do messages between or among computers travel along much different routes, but "packet switching" communication protocols allow individual messages to be subdivided into smaller "packets", which are then sent separately to a single destination where they are automatically reassembled by a receiving computer. Since the Internet is indifferent to the actual location of computers between which information is routed, there is no necessary connection between an Internet address and a physical jurisdiction. Moreover, different web sites can be interconnected by the use of hyperlinks, regardless of their location. Information arriving on a web site within a given jurisdiction may flow from a linked site entirely outside that jurisdiction.

However, in addressing jurisdictional issues, U.S. courts have so far largely ignored the technical structure of the Internet. They have focused instead on the physical locations of Internet viewers and web site operators and the kind of interaction takes place between them. Despite its complex structure, the Internet is predominately a passive system over which communication only occurs when it is initiated by a user. Understandably, courts have generally been reluctant to find personal jurisdiction unless a defendant uses the Internet in a way designed to impact the forum.

3. Applying Traditional Jurisdictional Principles to Different Uses of the Internet.

Precedents from print, telephone and radio media are particularly useful in determining whether jurisdiction exists over Internet activities. For example, e-mail sent over the Internet can be analogized to traditional postal mail or to phone calls: they are all means of communication that involve targeting someone's "address" or location. Thus, if an Internet-based news service were to send copies of an electronic article specifically addressed to viewers residing in a given forum by "push" technology, a court could find "purposeful direction." Such purposeful direction could exist even though, unlike physical shipment of copies of the National Enquirer, nothing is shipped physically.

Web sites and bulletin boards are less active than e-mail. One who posts a bulletin board message knows that it can be resent by others elsewhere in the world, but cannot control such redistribution. A web site, by itself, is essentially passive; it does not "send" anything directed to a specific person. Instead, it posts information which viewers anywhere can see merely by logging on to the web site. However, it is possible by counting the number of hits on a web site emanating from any given state to determine the "circulation" of a web-posted article in that state. A web site operator can thereby know whether a large proportion of hits come from a forum state. Accordingly, under the "effects test" it can be argued that an operator posting defamatory information about a California resident on a Virginia web site would reasonably expect an impact in California.

Although constitutional due process allows potential defendants to structure their conduct in a way to avoid the forum state, it is difficult for a web site operator to do so; the web overflows all boundaries, and the only way to avoid any contact whatsoever with a specific jurisdiction would be to stay off the Internet. Thus, under a purely technical analysis, mere accessibility of a web site, taken alone, should not be deemed to satisfy the Fourteenth Amendment minimum contacts requirements.

4. General Jurisdiction and the Internet.

The overwhelming majority of Internet jurisdiction cases have focused on specific jurisdiction. Only one

reported case since the First Report has relied on the operation of a web site accessible in the forum state to support general jurisdiction. In Mieczkowski v. Masco Corporation, a Texas child was asphyxiated when entangled in a bed manufactured by a North Carolina-domiciled defendant. The court held that there was no evidence that when the defendant placed the bed in the "stream of commerce" it could have foreseen it going into Texas, hence specific jurisdiction did not exist. Defendant had no offices, employees or registered agent or real or personal property in Texas and did not locally advertise. Acknowledging that general jurisdiction requires "continuous and systematic" contacts between defendant and the forum, the court stressed that the defendant shipped \$5.7 million worth of products to Texas residents over the six years and consummation of 250 transactions with Texas residents for approximately \$717,000 in sales in 1997. Sales to Texans had accounted for 3.2% of defendant's income over the preceding four years. Had the court stopped its analysis here, it probably could have found general jurisdiction without regard to the Internet. But the court also chose to weigh defendant's web site, which enabled viewers to select from an extensive list of furniture categories and conduct online shopping. The court drew from specific jurisdiction cases under which such a site would be categorized as very "interactive" to support its conclusion of general jurisdiction. Its failure to distinguish between general and specific jurisdiction and between levels of use renders this case difficult to rely upon in other contexts. It relied on a number of Internet cases dealing with specific jurisdiction

5. Specific Jurisdiction and the Internet.

An analytical framework for specific jurisdiction in the Internet was first articulated in Zippo Manuf. Co. v. Zippo Dot Com. Inc. ("Zippo"). Under Zippo, a given web site falls into one of three categories: (1) passive; (2) interactive; or (3) integral to the defendant's business. The "passive" web site is analogous to an advertisement in Time magazine; it posts information generally available to any viewers, who has no on-site means to respond to or the site. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on a passive Internet web site, because to do so would not be consistent with traditional personal jurisdiction law. A frequently cited decision involving a passive web site is Cybersell, Inc. v. Cybersell, Inc. ("Cybersell"). Cybersell rejected the notion that a home page "purposely avails" itself of the privilege of conducting activities within jurisdictions where it can be accessed. Under Cybersell (as well as under Zippo), no personal jurisdiction exists if the sole contact with the forum state is a web page accessible from the forum.

An "integral" web site is at the other end of the three categories. An integral site is used actively by a defendant to conduct transactions with persons in the forum state, receiving on-line orders and pushing messages directly to specific customers. In such cases, traditional analysis would support personal jurisdiction. The third category, or "interactive" site, falls between passive and integral. It allows a forum-state viewer to communicate information back to the site. Under Zippo, exercise of jurisdiction in the "interactive" context is determined by examining the level of interactivity and the commercial nature of the site.

The First Report observed that whether specific jurisdiction will be found and a site put in the "interactive" or "passive" category may turn more on a court's perception than on any real differences in the manner in which the user employs the Internet. Subsequent cases tend to support that observation, although the three-category method of analysis is not universally employed. Moreover, even courts which invoke a Zippo analysis largely ignore the "integral" category and focus only on whether a site is "passive" or "interactive." Which of the two labels is used can often determine the jurisdictional issue.

(a) Cases Involving "Passive" Web Sites.

When a web site is essentially passive and there are no other business contacts with the forum, and the site's content is not intended to have special "effects" within the forum, specific jurisdiction generally will not be found. Thus, the Court declined to base personal jurisdiction on mere use by defendant of a home page in Fernandez v. McDaniel Controls, Inc. A Hawaiian resident injured by an exploding oxygen tank gauge sued the Louisiana distributor who had not contracted with anyone in Hawaii, had no office there and had shipped only 1% of its gauges there, not as a result of contacts with Hawaiian purchasers but through distributors outside Hawaii. Citing Cybersell for the principle that mere accessibility of an Internet site is insufficient to subject the advertiser to jurisdiction, the court found that the other facts insufficient to warrant personal jurisdiction.

In Shapiro v. Santa Fe Gaming Corp., a non-Illinois defendant had a toll-free telephone number and a web site accessible to Illinois residents. Because there was no e-mail link available on the site, it was passive under the Zippo analysis. The issue was venue for an Illinois attorney's claim for legal fees in obtaining a settlement under Section 16(b) of the Securities and Exchange Act of 1934. The court found it "well-settled that the operation of a toll-free telephone number and a passive, non-advertising web site, without more, is insufficient to satisfy jurisdiction or venue."

If a web site is likely to have particular effects in the forum as compared to other states, an otherwise passive site can be the basis for jurisdiction. A New York federal court was called on to interpret the application of Illinois jurisdiction in Animation Station, Ltd. v. The Chicago Bulls, L.P. Granting a motion to transfer venue of a trademark suit to the Northern District of Illinois for the convenience of the parties and witnesses, the court stated that a non-Illinois defendant would be subject to personal jurisdiction in Illinois solely because its allegedly infringing web site was intended to attract fans of the Bulls basketball team, who prominently reside in Illinois.

Conseco, Inc. v. Hickerson cited Cybersell in rejecting Indiana personal jurisdiction over a non-resident whose web site criticized the Indiana plaintiff's insurance subsidiaries and asked viewers to submit information concerning fraud and other misconduct by them. The Court held that the allegedly defamatory site did not meet the "effects test" of Calder v. Jones, because the test is "not readily applicable in cases involving national or international corporations and the Internet." It reasoned that because the plaintiff was a national corporation with insurance subsidiaries and policyholders throughout the U.S., any potential harm would be nationwide rather than focused on Indiana. Since defendant had no other contacts with Indiana apart from the discussion of plaintiff on the web site, minimum contacts were lacking.

A toll-free number does not render a web site truly interactive, since any responsive communication is not made through the Internet. In Green v. William Mason & Co., a New Jersey plaintiff sued a nonresident defendant that parent of a New Jersey investment adviser for ERISA violations. Neither the parent's web site nor its toll-free number were related to plaintiff's retention of the subsidiary in the forum as investment adviser or the subsidiary's investment of ERISA plan funds. The court found the web site passive and rejected an argument that the web site and phone number were the functional equivalent of a physical office in New Jersey. Similarly rejecting personal jurisdiction based solely on a web site and a toll-free telephone number was Osteotech, Inc. v. GenSci Regeneration Sciences, Inc., a patent infringement case against a Canadian defendant which had not conducted any commercial activities in New Jersey. The defendant's toll-free number allowed viewers to order products shown on its

web site. Assuming Osteotech had involved evidence of actual orders placed and executed through the toll-free number, even though the site was not interactive the result could well have been different.

However, if the content of a passive web site can be deemed to be aimed at the forum and to have particular effects there, the courts can find specific jurisdiction. Panavision International, L.P. v. Toeppen involved a passive site. However, the court applied the "effects test" to a "cyber pirate" defendant, who made a practice of acquiring Internet domain names that were the same as well-known trademarks and then forcing the trademark owners to pay for the domain names. Defendant was an Illinois resident who had purposely registered Panavision's registered mark as a domain name in order to force Panavision to buy out his rights. The Ninth Circuit invoked the "effects test" of Calder v. Jones, discussed above, to find the defendants' actions were expressly aimed at the forum state which was Panavision's principal place of business and the movie and television center, and caused Panavision harm there, which the defendant knew would be most likely.

Inconsistent with the analyses in Cybersell and Zippo was Quality Solutions, Inc. v. Zupanc. The court held that listing in a trade journal circulated in Ohio and maintenance of an Internet site accessible in Ohio was sufficient for personal jurisdiction over a nonresident in a trademark action. Contrary to the general rule applicable to widely-distributed magazines, the court found that "active advertising in a trade journal reasonably can be construed as an attempt to solicit business within Ohio." With minimal analysis, it also found that an Internet site using an allegedly infringing name "constitutes tortious injury resulting from the regular solicitation of business" under the long-arm statute. Although the analysis was faulty, the same result might have been reached under the "effects test." Where passive site's domain name contains someone else's trademark, courts have presumed that there is an intended effect in the trademark owner's domicile. Quality Solutions, at least in its reasoning, is akin to Internet cases discussed in the First Report that "stretch the limits of personal jurisdiction" and are "difficult to reconcile with the [non-Internet] cases finding that the advertisements in newspapers and magazines are insufficient to support personal jurisdiction".

(b) Cases Involving "Interactive" Sites.

A web site that invites inquiries or other responses over the Internet through an e-mail hyperlink is interactive. In such cases, the courts generally look for evidence that the e-mail connection is actually used by forum residents to produce transactions there. If not, courts are reluctant to find personal jurisdiction. In Transcraft Corp. v. Doonan Trailer Corp. ("Transcraft"), defendant's web site with an allegedly infringing mark was accessible in Illinois. It site displayed a toll-free number, the names of defendant's dealers (none of whom were located in Illinois) and a link for e-mail inquiries. Using a Zippo analysis, the court found the web site insufficient to support jurisdiction. Without addressing the toll-free telephone number, the court said there was no evidence that e-mail communications were made with Illinois residents or that the site was used to encourage contacts with Illinois. Nor was the web site intended to have special "effects" in Illinois.

In contrast to its holding in Inset, where the Connecticut federal court found jurisdiction with a passive site, it found no jurisdiction in two later cases although the sites were interactive rather than passive. In E-Data Corp. v. Micropatent Corp., a foreign corporation that used the Internet to sell and transmit photography images by a method claimed to infringe plaintiff's patent. Plaintiff relied on Inset by pointing to over 10,000 Internet access sites in Connecticut. The court rejected jurisdiction on grounds that (a) the viewer had to take more steps to access the site than in Inset and (b) there was no evidence of

any Connecticut resident actually accessing the site. Nor was the Court influenced by defendant's national advertising or toll-free number, absent actual transactions. In Edberg v. Neogen Corp. products allegedly infringing the Connecticut plaintiff's patents were displayed in an online catalog on the defendant's web site along with an "800" number. There was no evidence of online transactions. The court rejected jurisdiction and distinguished Inset on the basis that defendant's domain name there had been the "Inset" trademark and hence "the source of the tortious conduct." The Edberg court did not draw the same inferences drawn in Inset that some of the 10,000 Connecticut Internet subscribers must have accessed the site.

The absence of evidence of any actual transactions on an interactive web site led the Eastern District of Pennsylvania to conclude that copyright infringement venue could not exist in Blackburn v. Walker Oriental Rugs Galleries, Inc.. This action against residents of the Western District of Pennsylvania required a jurisdictional analysis, because copyright venue is only proper in a district where the defendant would be amenable to personal jurisdiction if the district were a separate state. The court found defendants' only presence in the district to be through their web site, which it labelled "passive". The site allowed viewers to send e-mail messages but did not provide a capability of purchasing products and no actual purchases were alleged. The court incorrectly read Zippo by stating that the e-mail link was not enough to take the site out of the passive category, interactivity exists whenever the viewer can contact the site operator through the e-mail. Nonetheless, the court's holding against personal jurisdiction was in accord with the majority of cases where a site is interactive but no actual transactions in the forum can be shown.

Scherr v. Abrahams involved a trademark action by a magazine publisher against a non-resident publisher of magazine. The court found the "insubstantial" number of defendant's magazines coming into Illinois and two inactive Illinois residents on defendant's editorial board insufficient for jurisdiction. Following Zippo, the court then examined the level of interactivity and commercial nature of the information exchange on defendant's web site. Although 20,000 condensed versions of the defendant's magazine were delivered on-line, and site viewers could submit their e-mail addresses to receive the version, there was no evidence as to how many were sent into Illinois. The court found this interactivity level "rather low"; moreover, it stressed that viewers did not pay for the electronic version, which contained no advertisements except those for defendant's products. It also observed that nothing on the site specifically targeted Illinois consumers. Whether the result would have differed had defendant charged for its magazine or carried paid advertising of others is unclear. Nor is it clear whether, if evidence had been adduced showing a substantial number of the 20,000 electronic versions delivered to Illinois residents, the result would have been different.

Ability to post a message on the bulletin board of an Internet access provider makes the site "interactive" but does not necessarily provide a jurisdictional basis. In Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc., a non-resident sent an allegedly defamatory message from Washington to Virginia, where it was posted on an electronic bulletin board on America On Line ("AOL"). Approximately 200,000 District of Columbia AOL subscribers might have had access to the posting. The court held that since the electronic message was not sent to or from the District and its subject matter had nothing to do with the District, the defendant could not be construed as transacting business there: "[t]he act of posting a message on an AOL electronic bulletin board--which certain AOL subscribers may or may not choose to access, according to each individual's tastes and interests,--is not an act purposely or foreseeably aimed at the District of Columbia."

The open discussion forum or "chat box," is a notch more interactive than a bulletin board, because it allows viewers to engage in on-going e-mail "conversations" by exchanging messages. Clayton v. Farb involved allegedly defamatory statements posted on a chat box operated by defendant in North Carolina. Plaintiff claimed injury incurred in Delaware when a Delaware subscriber accessed the forum. Rejecting his argument, the court held that merely posting a message on a site that can be accessed in the forum by those who wish to read it is not an act "purposely aimed" at the forum and does not constitute "transacting business" in the forum, when the subject matter has nothing to do with the forum.

Also rejecting personal jurisdiction when an interactive web site was accompanied by both an "800" number and an e-mail link allowing viewers to contact the site operator was CFOS 2 GO, Inc. v. CF2 GO, Inc.. A Washington trademark defendant had no contact with California via its web site except that: (1) when contacted by a California resident (at plaintiff's request) to ask if defendant conducted work outside Washington, an employee sent promotional materials to California; and (2) defendant maintained a list of e-mail addresses for communicating over the Internet. The list had not been used, and in fact the web site was apparently never "up and running," but merely a test site. The district court applied Zippo and Cybersell to find that defendant's Internet activities amounted to only minimal contact with California.

The "effects test" has been increasingly used to find jurisdiction where a web site has a low level of interactivity or is even passive. In Vittulo v. Velocity Powerboats, Inc., Illinois plaintiffs sued Florida defendants for making and selling a powerboat that allegedly had caused death and injuries. Neither defendant sold any products in Illinois; the powerboat was sold to an independent Michigan distributor which later resold it in Illinois. The Florida manufacturer's web site included photographs, descriptions, specifications and prices of its boats and an e-mail contact, although the site could not process orders. However, the site had advertised to Illinois residents to attend a Chicago boat show at which defendants' boats were exhibited by their Michigan distributor. The court viewed this as an affirmative step by defendants "to target Illinois as a landing site for their products." Although unnecessary to its ultimate holding, the court labelled the web site interactive. Using the "narrow stream of commerce" theory, the court said that soliciting on the web site of attendance at the Chicago boat show was "additional conduct" beyond mere placement of a product into the stream of commerce, that brought the product manufacturer within jurisdiction of the forum state.

The "effects test" was also applied to buttress a finding of personal jurisdiction involving a very interactive site in Blumenthal v. Drudge. A White House official sued a nonresident electronically-published gossip columnist for defamation arising from a column, the "Drudge Report," which was available on-line to all AOL members. There was regular electronic distribution of the gossip column to District residents, who were solicited for and gave contributions; availability of the site to District residents 24 hours a day; and other non-Internet related contacts within the District. The court found that "[t]he constant exchange of information and direct communication "the epitome of web site interactivity." The court also used the "effects test," finding that Drudge must have been aware that his column's political content would have its "most devastating effects" in the District.

In Park Inns Internl, Inc. v. Pacific Plaza Hotels, Inc., personal jurisdiction was found in Arizona where non-domiciliary defendants in a trademark suit had web sites allowing Arizona viewers to create, amend or cancel hotel reservations." There was evidence of (1) actual reservations made online from Arizona and (2) solicitation and transaction of business in a computerized reservations network. Distinguishing Cybersell, the court found defendants' sites "clearly" more interactive because of numerous actual hits

from forum residents. In Telephone Audio Productions, Inc. v. Smith, a trademark infringement suit, the court found personal jurisdiction over non-resident defendants. The court declined to determine if a web site alone would sustain jurisdiction, but instead relied on the combination of (1) a web site having an allegedly infringing trademark accessible to Texas residents, (2) defendants' physical presence and solicitation of orders at a Texas trade show, (3) defendants' receipt of orders from distributors in Texas and (4) their advertising in a magazine whose readers might be in Texas.

In Thompson v. Handa-Lopez, Inc., personal jurisdiction in Texas was found over a California corporation whose web site featured casino games. The court labelled the site "interactive," because defendant did more than merely advertise and maintain a toll-free telephone number: "it continuously interacted with the casino players, entering into contracts with them as they played the various games." When the plaintiff won cash or prizes, he would receive his winnings in Texas. The court used the Zippo analysis, but it erred in calling the site "interactive." The site actually falls under Zippo's "integral" category, since business was transacted directly through the site.

In Rubbercraft Corp. of California v. Rubbercraft, Inc., plaintiff owned the trademark "Rubbercraft", which defendant had also used in the southeastern United States. After defendant began placing annual advertisements in a nationally-circulated trade publication, initiated a toll-free telephone number and created an Internet web page with the domain name "rubbercraft.com." Because defendant's annual sales in California were no more than 0.5% of its total sales, the court found no "systematic or substantial activities" in the forum and denied general jurisdiction. However, it found specific jurisdiction on the combination of periodical advertising, an "800" telephone line, defendant's advertising its products and gathering consumer information on its web site, and actual sales in California. The court distinguished Cybersell which it said involved no actual business done, income earned or telephone contacts in the forum.

CONCLUSION

Since the first report, courts have tendered to truncate the three category system of site classification ("passive," "interactive" and "integral") into a two-tier system; they label sites either passive or interactive and, if interactive, measure the level of activity and degree of commercialization. Sites that would be "integral" under the Zippo analysis are labelled highly interactive. Recent cases suggest that it is important to adduce quantitative evidence of the defendant's Internet-related business in the forum, even if the actual numbers are low. If more than a few online transactions in the forum can be established, the courts will lean in favor of specific jurisdiction. Thus far, it is difficult to draw any bright lines to determine how many transactions are needed, but one may be enough if other factors are present. If a defendant's only Internet activity is advertising on a passive web site, the courts may forgo a Zippo analysis and instead use the "effects test." If the plaintiff can persuade the court that the defendant intended some special effect to be felt in the forum as compared to other jurisdictions, jurisdiction will likely be found. If the defendant's domain name uses the plaintiff's registered trademark, such an effect on plaintiff's principal place of business will be presumed.